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 DAVID E. MASTAGNI, ESQ. (SBN 204244)  
 WILL M. YAMADA, ESQ. (SBN 226669)  
 JAMES R. TRABER, ESQ. (SBN 248439)  
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Attorneys for Plaintiffs and  
 Counter-Defendants

IN THE UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA

DANIEL J. MITCHELL, acting for himself )  
 and others similarly situated, )

Plaintiffs,

v. )

COUNTY OF MONTEREY, )

Defendant. )

COUNTY OF MONTEREY, )

Counterclaimants, )

v. )

DEPUTY SHERIFFS' ASSOCIATION OF )  
 MONTEREY COUNTY, a labor )  
 organization, and DAN MITCHELL, acting )  
 for himself and others similarly situated, )  
 DAVID A. ALLRED, JOHN C. BAIRD, )  
 JOSEPH ANTHONY CHAFFEE, JOHN )  
 DiCARLO, EDWARD DURHAM, )  
 DENNIS ENGLISH, NELSON GARCIA, )  
 RUBEN GARCIA, DUSTIN HEDBERG, )  
 ALFRED JIMENEZ, TIM KREBS, )  
 RICHARD D. MATTHEWS, )  
 (see next page)

Case No.: C 08-01166 JW

**NOTICE OF MOTION AND MOTION TO  
 DISMISS DEFENDANT COUNTY OF  
 MONTEREY'S COUNTER-CLAIMS**

[FRCP, Rule 12(b)(6) and Rule 12(b)(1); Local  
 Rule 7-2]

Date: September 22, 2008

Time: 9:00 a.m.

Courtroom No.: 8

Judge: Hon. James Ware

1 BRUCE MAUK, WILLIAM D. NAPPER, )  
 2 SHAWN O'CONNOR, DAVID R. )  
 3 RATTON, KENNETH A. RESOR, )  
 4 ROBERT Q. RODRIGUEZ, MICHAEL R. )  
 5 SHAPIRO, and GARY WHEELUS, and all )  
 6 other Plaintiffs who are now or may )  
 7 hereafter be joined in this proceeding, )  
 8 )  
 9 Counter-Defendants. )  
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 11 )  
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**TO ALL PARTIES AND ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that on September 22, 2008, at 9:00 a.m., or as soon thereafter as counsel can be heard in Courtroom 8 of the United States District Court, located at 280 South First Street, San Jose, California 95113, the Plaintiff and Counter-Defendant, Daniel J. Mitchell, acting for himself and others similarly situated, and the Counter-Defendant Deputy Sheriffs' Association of Monterey County, a labor organization, will move this Court for an order dismissing Defendant County of Monterey's Counterclaims for Declaratory Relief and Reimbursement of Overpayment of Wages, pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), on the grounds that the Defendant County of Monterey's Counterclaims fail to state facts sufficient to constitute any claims against the Counter-Defendants Deputy Sheriffs' Association of Monterey County, a labor organization, and Plaintiff and Counter-Defendant, Daniel J. Mitchell, acting for himself and others similarly situated, under federal law and/or under any pendent state law claims or theories of recovery.

Said Motion to Dismiss will be made on the following grounds:

**COUNTERCLAIM—COUNT ONE**

1. The Counterclaim—Count One, for “mistake as to base rate of pay,” fails to state facts sufficient to state a claim upon which relief can be granted against the Plaintiff and Counter-Defendant, Daniel J. Mitchell acting for himself and others similarly situated. [FRCP, Rule 12(b)(6)]

2. The Counterclaim—Count One, for “mistake as to base rate of pay,” fails to state facts sufficient to state a claim upon which relief can be granted against the Counter-Defendant, the Deputy Sheriffs' Association of Monterey County, a labor organization. [FRCP, Rule 12(b)(6)]

3. The Counterclaim—Count One, for “mistake as to base rate of pay,” fails to state facts sufficient to state a claim upon which relief can be granted against the Plaintiff and Counter-

1 Defendant, Daniel J. Mitchell acting for himself and others similarly situated, because the Court lacks  
2 jurisdiction over the subject matter of said Counterclaim. [FRCP, Rule 12(b)(1)]

3 4. The Counterclaim—Count One, for “mistake as to base rate of pay,” fails to state facts  
4 sufficient to state a claim upon which relief can be granted against the Counter-Defendant, the Deputy  
5 Sheriffs’ Association of Monterey County, a labor organization, because the Court lacks jurisdiction  
6 over the subject matter of said Counterclaim. [FRCP, Rule 12(b)(1)]

7 **COUNTERCLAIM—COUNT TWO**

8 5. The Counterclaim—Count Two, for “mistake as to accumulating non-working hours  
9 for overtime,” fails to state facts sufficient to state a claim upon which relief can be granted against the  
10 Plaintiff and Counter-Defendant, Daniel J. Mitchell acting for himself and others similarly situated.  
11 [FRCP, Rule 12(b)(6)]

12 6. The Counterclaim—Count Two, for “mistake as to accumulating non-working hours  
13 for overtime,” fails to state facts sufficient to state a claim upon which relief can be granted against the  
14 Counter-Defendant, the Deputy Sheriffs’ Association of Monterey County, a labor organization.  
15 [FRCP, Rule 12(b)(6)]

16 7. The Counterclaim—Count Two, for “mistake as to accumulating non-working hours  
17 for overtime,” fails to state facts sufficient to state a claim upon which relief can be granted against  
18 the Plaintiff and Counter-Defendant, Daniel J. Mitchell acting for himself and others similarly situated,  
19 because the Court lacks subject matter jurisdiction over said Counterclaim. [FRCP, Rule 12(b)(1)]

20 8. The Counterclaim—Count Two, for “mistake as to accumulating non-working hours  
21 for overtime,” fails to state facts sufficient to state a claim upon which relief can be granted against  
22 the Counter-Defendant, the Deputy Sheriffs’ Association of Monterey County, a labor organization,  
23 because the Court lacks subject matter jurisdiction over said Counterclaim. [FRCP, Rule 12(b)(1)]

24 The Motion to Dismiss will be based upon this Notice and Motion, the Supporting  
25 Memorandum of Points and Authorities, items of which judicial notice have been requested, all papers  
26 and pleadings on file, and upon any other evidence as may be presented at the hearing of this Motion  
27 to Dismiss.

28 ///

1 Dated: June 6, 2008

**MASTAGNI, HOLSTEDT, AMICK,  
MILLER, JOHNSEN & UHRHAMMER**

2  
3 By: /s/ James B. Carr  
JAMES B. CARR  
4 Attorneys for Plaintiffs/Counter-Defendants  
5 Dan Mitchell, et al., and for Counter-Defendant,  
Deputy Sheriffs' Association of Monterey County  
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13 Attorneys for Plaintiffs

14  
15 IN THE UNITED STATES DISTRICT COURT  
16  
17 NORTHERN DISTRICT OF CALIFORNIA  
18

19 DANIEL J. MITCHELL, acting for himself )  
20 and others similarly situated, )

21 Plaintiffs, )

22 v. )

23 COUNTY OF MONTEREY, )

24 Defendant. )

25 \_\_\_\_\_ )  
26 COUNTY OF MONTEREY, )

27 Counterclaimants, )

28 v. )

29 DEPUTY SHERRIFS' ASSOCIATION OF )  
30 MONTEREY COUNTY, a labor )  
31 organization and DAN MITCHELL, acting )  
32 for himself and others similarly situated, )  
33 DAVID A. ALLRED, JOHN C. BAIRD, )  
34 JOSEPH ANTHONY CHAFFEE, JOHN )  
35 DiCARLO, EDWARD DURHAM, DENNIS )  
36 ENGLISH, NELSON GARCIA, RUBEN A. )  
37 GARCIA, DUSTIN HEDBERG, ALFRED )  
38 JIMENEZ, TIM KREBS, RICHARD D. )  
39 MATTHEWS, BRUCE MAUK, )  
40 (see next page) )

Case No.: C 08-01166 JW

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO DISMISS DEFENDANT  
COUNTY OF MONTEREY'S  
COUNTER-CLAIMS**

[FRCP, Rule 12(b)(6) and Rule 12(b)(1);  
Local Rule 7-9(b)]

Date: September 22, 2008

Time: 9:00 a.m.

Courtroom No.: 8

Judge: Hon. James Ware

1 WILLIAM D. NAPPER, SHAWN )  
 2 O'CONNOR, DAVID R. RATTON, )  
 3 KENNETH A. RESOR, ROBERT Q. )  
 4 RODRIGUEZ, MICHAEL R. SHAPIRO, )  
 5 and GARY WHEELUS, and all other )  
 6 Plaintiffs who are now or may hereafter be )  
 joined in this proceeding, )  
 Counter-Defendants. )

7 **TO ALL PARTIES AND ATTORNEYS OF RECORD:**

8 The Plaintiff and Counter-Defendant, Daniel J. Mitchell, acting for himself and others similarly  
 9 situated, and the Counter-Defendant Deputy Sheriffs' Association of Monterey County, a labor  
 10 organization, hereby submit the following Memorandum of Points and Authorities in Support of their  
 11 Motion to Dismiss the Defendant County of Monterey's Counterclaims for Declaratory Relief and  
 12 Reimbursement of Overpayment of Wages.

13 **I.**

14 **STATEMENT OF THE CASE**

15 **A. Jurisdiction.**

16 This action was originated by the Plaintiffs, Daniel J. Mitchell, acting for himself and others  
 17 similarly situated, as a wage and hour claim under the Fair Labor Standards Act, 29 U.S.C. § 201, et  
 18 seq., a federal statute (hereafter "FLSA"). The original complaint was filed on February 27, 2008.  
 19 Jurisdiction is proper for the Plaintiffs under 29 U.S.C. § 216(b) and 28 U.S.C. § 1331, and this type  
 20 of "collective" action is authorized by the FLSA. The Counter-Defendant, Deputy Sheriffs'  
 21 Association of Monterey County, a labor organization, is not a plaintiff in this FLSA complaint, and  
 22 it cannot bring a FLSA wage and hour suit on behalf of its membership in a representative or agency  
 23 capacity under the FLSA.

24 There is no basis for federal subject matter jurisdiction over Counter-Defendant, the Deputy  
 25 Sheriffs' Association of Monterey County, under the FLSA relating to these two counterclaims asserted  
 26 by the Counterclaimant, Monterey County. In addition, it is the Plaintiffs and Counter-Defendants'  
 27 contention that the Court has no other subject matter jurisdiction under any other statute to adjudicate  
 28 a "contract" dispute under the Memorandum of Understanding (hereafter "MOU") that was previously

1 entered into between the County of Monterey (the employer) and the Deputy Sheriffs' Association of  
2 Monterey County (a public employee labor organization), under California law. See: Cal. Government  
3 Code § 3500 seq. (the Meyers-Milias-Brown Act).

4 Further, there is no basis for federal jurisdiction over the individual county employees who have  
5 not yet "opted into" and consented to this FLSA action, who the Counter-Claimant, Monterey County  
6 seeks to sue as individual defendants in its counterclaims. Likewise, the County of Monterey is not  
7 entitled, under California state law, to sue the individual members of the Deputy Sheriffs' Association  
8 of Monterey County for alleged "contract violations" and/or "recision" or "mistake" or  
9 "reimbursement" of the terms of the MOU. Cal. Government Code § 3500 seq. (the Meyers-Milias-  
10 Brown Act).

11 The County of Monterey has improperly attempted to invoke the subject matter jurisdiction of  
12 the District Court by bringing its counterclaims for revision of a contract mistake in the negotiation of  
13 the base rate of pay in the MOU between the parties and the manner in which overtime pay hours were  
14 determined under the MOU. These are both "contract disputes" that must be negotiated under the  
15 parties' duties of "meet and confer" pursuant to their collective bargaining agreement (MOU) under  
16 state law. Cal. Government Code § 3500, et seq. (The Meyeres-Milias-Brown Act). It is not a legal  
17 issue that can be decided by the District Court under the guise of the FLSA.

18 Thus, it is the Plaintiffs and Counter-Defendants' contentions that this Court lacks subject  
19 matter jurisdiction to determine and declare any "reimbursements" or "mistakes" of fact or law as to  
20 the MOU collective bargaining agreement between the parties and/or to order any type of declaratory  
21 relief relating to information (facts) relied upon by the County of Monterey in negotiating its MOU's  
22 with the Plaintiffs and Counter-Defendants. Cal. Government Code § 3500 seq. (the Meyers-Milias-  
23 Brown Act). Therefore, there is no proper basis for federal jurisdiction over the counterclaims based  
24 upon 28 U.S.C. § 1367, as pled by the County of Monterey.

25 **B. Jurisdiction over Individual Plaintiffs.**

26 In addition, the Counterclaims are defective as to the individually named Counter-Defendants  
27 because the County of Monterey has attempted to prematurely assert its contract dispute claims against  
28 its employees, who have not appeared as individual plaintiffs in this FLSA action and who may "opt-

in” to the FLSA action in the future. (See: Counterclaim, Paragraph No. 102). Each of these individuals would have to be individually served with a summons and complaint regarding the improper contract claims attempting to be asserted by the County of Monterey. There is no personal jurisdiction over these potential counter-defendants. FRCP, Rule 12(b)(2).

To reiterate, it is the Plaintiffs and Counter-Defendants’ position that these counterclaims cannot be brought in this manner by the County of Monterey under the FLSA because only individual employees can be plaintiffs under the FLSA, and because there is no subject matter or personal jurisdiction properly asserted as a basis for these “contractual” counterclaims. The basis for federal jurisdiction over these MOU contract issues (alleged “claims”) is not properly set forth or sufficiently pled in the Counterclaim. The Defendant’s Counterclaim must contain a proper short and plain statement setting forth a proper basis for federal jurisdiction over the “contract” claims set forth in the Counterclaim. FRCP Rule 8(a)(1). When federal jurisdiction is based upon the presence of a federal question, the claimant (counterclaimant) must identify the Constitutional provisions, laws, or treaties that create such jurisdiction. 28 U.S.C. § 1331. The pleading must allege facts essential to show jurisdiction and the claimant (counterclaimant) bears the burden of proving the existence of federal jurisdiction. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189; *United States v. Bustillos*, 31 F.3d 931, 933 (10<sup>th</sup> Cir. 1994).

## II.

### STATEMENT OF FACTS

#### A. Original Complaint.

The Plaintiff, Daniel Mitchell, acting for himself and others similarly situated filed this FLSA wage and hour complaint on February 27, 2008, alleging that the County of Monterey did not properly paid overtime wages to its deputy sheriff employees in violation of the FLSA. (Complaint, paras. 2)

The case is brought as a “collective” action on their own behalf and on behalf of all others similarly situated under 29 U.S.C. § 216, for damages, liquidated damages, a three year statute of limitations, and costs and attorneys fees, as provided by statute. (Complaint, Paras. 6-8, and 33)

The Plaintiffs have asserted that they were employed by the Defendant County of Monterey, under the terms of an MOU (collective bargaining agreement) negotiated between the parties, as deputy



1 sheriffs and have performed work for the Counterclaim over the past three years and were required to  
 2 be paid overtime. (Complaint Paras. 14-15, and 33) They have alleged that they were required by  
 3 their employer to perform uncompensated pre-shift work and post-shift work. (Complaint, Paras. 16-  
 4 25) In addition, the Plaintiffs have asserted claims for the impermissible exclusion of non-discretionary  
 5 bonuses, incentive pay, pay differentials, extra compensation, and their regular rate of pay which all  
 6 have effected their overtime compensation rates and pay. Likewise, compensatory time off pay has  
 7 also been affected by these policies and practices. (Complaint, Paras. 26–32) It is alleged that the  
 8 Defendants past and current practices have done illegally, willfully and intentionally under the  
 9 applicable provisions of the FLSA. (Complaint, Paras. 33-41)

10 The Deputy Sheriffs' Association of Monterey County is a labor organization. It is not a  
 11 plaintiff in this action. This case has been filed under the FLSA as a "collective" action by the  
 12 individual employees, who must sign consents and opt-in to the litigation in order to share in any  
 13 monetary recovery. This is not a representative action. The Deputy Sheriffs' Association of Monterey  
 14 County is not a proper party to this FLSA action. The Portal-to-Portal amendments to the FLSA bar  
 15 unions from bringing representative actions for employees who are union members. *Arrington v.*  
 16 *National Broadcasting Company, Inc.*, 531 F. Supp. 498, 500 (DDC 1982). The employee association  
 17 cannot be a party in this action. *State of Nevada Employee's Association, Inc. v. Bryan*, 916 F. 2d.  
 18 1384, 1391-1392 (9<sup>th</sup> Cir 1990).

19 **B. Monterey County Counterclaims.**

20 The counterclaims set forth in the Defendant's Answer to the Complaint (Paragraphs Nos. 99-  
 21 118), have been asserted by the Defendant employer against the Deputy Sheriffs' Association of  
 22 Monterey County, a labor organization, as well as against the original plaintiff, Daniel J. Mitchell,  
 23 acting for himself and other similarly situated, and names David A. Allred, John C. Baird, Joseph  
 24 Anthony Chaffee, John Di Carlo, Edward Durham, Dennis English, Nelson Garcia, Ruben A. Garcia,  
 25 Dustin Hedberg, Alfred Jimenez, Tim Krebs, Richard D. Matthews, Bruce Mauk, William D. Napper,  
 26 Shawn O'Connor, David R. Ratton, Kenneth A. Resor, Robert Q. Rodriguez, Michael R. Shapiro and  
 27 Gary Wheelus, and "all others who may join the original action as Plaintiffs are or have been or claim  
 28 to have been employees of the Monterey County Sheriffs' Department within the last three years."

1 (Counterclaim, Paras. 101-102)

2 The counterclaims asserted by Defendant Monterey County are related to the MOU collective  
3 bargain agreement previously entered into by the parties. (See: Counterclaim, Paras. 104-107 and 113-  
4 118) The Defendant-Counterclaimant is requesting declaratory relief to correct “mistakes” based upon  
5 information it relied upon from a third party (the City of Salinas) to calculate a “benchmark wage” that  
6 was used in the MOU. (See: Count One) (Counterclaim, Paras. 103-110) It is further seeking  
7 reimbursement of wages paid under the MOU resulting from the counting of non-working hours (such  
8 as vacation time, sick leave and compensated time off) in the determination of overtime pay. (See;  
9 Count Two) (Counterclaim, Paras. 111-118) (See: Count Two)

10 **1. Count One (Mistake).**

11 This claim seeks the correction of an alleged mistake in the manner of calculating and paying  
12 overtime wages under the MOU. This is a contract claim. It is subject to meet and confer between  
13 the County and its employees and the inclusion of this claim has ignored the meet and confer process,  
14 required by the MOU. Cal. Government Code § 3500 seq. (the Meyers-Milias-Brown Act). There  
15 is no allegation that the County has “meet and conferred” over this contract issue and exhausted all  
16 administrative remedies. Cal. Gov. Code § 3505. It is fatally defective. No copy of the MOU is  
17 attached or incorporated into the counterclaim. The terms of the MOU provisions are not set forth in  
18 the counterclaim.

19 **2. Count Two (Reimbursement).**

20 This claim seeks the reimbursement of wages already paid to its employees under the terms of  
21 the MOU and a declaration that overtime was paid based on the accumulation of non-working hours.  
22 Again, this is a contract bargaining issue that is subject to the meet and confer and administrative  
23 remedies relating to the MOU. Cal. Government Code § 3500 seq. (the Meyers-Milias-Brown Act).  
24 Again, no copy of the MOU provisions are attached or incorporated or set forth in the counterclaim.  
25 The County has not alleged that it has met and conferred over these contract issues and/or exhausted  
26 administrative remedies provided in the MOU.

27 Consequently, the facts set-forth in the Defendant’s counterclaims fail to allege facts upon  
28 which relief can be granted to the Defendant-Counterclaimant. These are contract (labor negotiation)

issues that have been improperly placed before the Court in this FLSA action. The Counterclaims are improper and fail to state claims upon which any relief can be granted. Proper subject matter is lacking, and there is no proper personal jurisdiction over the individually named counter-defendants and/or over “unnamed” potential counter-defendants who may “opt-in” to this FLSA action in the future.

### III.

#### LEGAL ARGUMENT

##### A. Standard of Review.

##### 1. Failure to State a Claim.

A party is entitled to bring a Motion to Dismiss under Federal Rules of Civil Procedure, Rule 12(b)(6), for failure to state a claim. Rule 12(b)(6) tests the legal sufficiency of a party’s claim for relief. A claim may be dismissed because it does not assert a cognizable theory of recovery as a matter of law, or because it fails to allege facts sufficient to support a cognizable legal claim. *SmileCare Dental Group v. Dental Plan of California*, 88 F. 3d 780, 783 (9<sup>th</sup> Cir., 1996)

On a Motion to Dismiss, the allegations of the Counterclaims must be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972). The Court is bound to give the Plaintiff the benefit of every reasonable inference to be drawn from any well-pleaded allegations in the FAC. *Retail Clerks Int’l Ass’n v. Schermerhorn*, 373 U.S. 746, 753, n.6 (1963).

##### 2. Lack of Jurisdiction.

A claim (counterclaims) may also be dismissed for lack of jurisdiction on the grounds that the District Court lacks the statutory authority to hear and decide the dispute on the basis that there is no federal question at issue. Federal Rules of Civil Procedure, Rule 12(b)(1). A claim can be challenged both facially and substantively. *White v. Lee*, 227 F. 3d 1214, 1242 (9<sup>th</sup> Cir. 2000); *Gould Elecs, Inc. v. United States*, 220 F. 3d 169 (3<sup>rd</sup> Cir. 2000). On a facial challenge, the defendant contests the adequacy of the language used in the pleading. *Turicentro, S.A. v. American Airlines, Inc.*, 303 F. 3<sup>rd</sup> 293, 300 n.4 (2002). On a substantive challenge, the defendant objects to the factual merits of the asserted federal jurisdiction. *Ruiz v. McDonnell*, 299 F. 3<sup>rd</sup> 1173, 1179(10<sup>th</sup> Cir. 2002).

In federal question cases, the counter-claimant must demonstrate a non-frivolous claim based

upon federal law. *Neitzke v. Williams*, 490 U.S. 319, 327 n.6 (1989); *Janicki Logging Co. v. Mateer*, 42 F. 3d 561 (9<sup>th</sup> cir. 1994). The Defendant counter-claimant must also meet all statutory requirements (prerequisites) for litigating a federal claim and exhaust all administrative remedies. *Jackson v. United States*, 110 F. 3d 1484, 1486 (9<sup>th</sup> Cir. 1997); *Hart v. Department of Labor*, 116 F. 3<sup>rd</sup> 1338 (10<sup>th</sup> Cir. 1997).

## **B. Statutory Authority.**

### **1. The FLSA Controls Over MOU.**

The FLSA takes precedence over conflicting provisions that may be contained in the MOU. The Collective Bargaining Agreement cannot supercede the Act, and the MOU cannot abridge the Act. FLSA rights cannot be waived and the FLSA is independent of the remedies that may exist under the MOU / CBA. *Martino v. Michigan Window Cleaning Co.*, 327 U.S. 173 (1946) The FLSA rights take precedence over conflicting provisions in the MOU. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1961)

The FLSA provides an independent claim (remedy), not dependent upon the terms of the MOU. *Utility Workers v. Southern California Edison*, 83 F.3d 292 (9<sup>th</sup> Cir. 1996) Likewise, if the employees had filed both an FLSA lawsuit and a violation of contract suit, the Court will defer the contract claims to the grievance procedure in the contract (MOU) while proceeding to hear the FLSA claims. *Summer v. Howard University*, 127 F. Suppl 2d 27 (DDC, 2000).

### **2. Standing Under FLSA.**

Only individual employees have a right to sue for damages for violation under the FLSA. *United Food & Commercial Workers Union, Local 1564 of New Mexico*, 207 F. 3<sup>rd</sup> 1193, 1200 (10<sup>th</sup> Cir., 2000). Standing to sue under the FLSA is statutorily limited to employees only. There is no right for the employer to sue under the FLSA for violations of the MOU, for “contract” mistakes and/or for declaratory relief. 29 U.S. C. § 216(b). The County of Monterey lacks standing to bring its counterclaims in this action. *Texton Lycoming Reciprocating Engine Division, AVCO Corp. v. UAW*, 523 U.S. 653 (1998)

### **3. No Federal Rights Under MOU.**

There are no federal rights involved in the MOU, which has been negotiated under California

1 law, not federal labor laws. Cal. Government Code § 3500 seq. The MOU was negotiated between  
 2 the parties under California State law, commonly known as the Meyers-Milas-Brown Act. *Valencia*  
 3 *v. County of Sonoma* (2007) 158 Cal. App. 4<sup>th</sup> 644, 648. When approved by the governing body of  
 4 Monterey County, the MOU became a binding agreement between the Deputy Sheriffs' Association  
 5 of Monterey County and Monterey County. *Glendale City Employee's Association, Inc. v. City of*  
 6 *Glendale* (1975) 15 Cal. 3<sup>rd</sup> 328, 336. Once signed, the MOU cannot be abrogated by public  
 7 referendum and is subject to the constitutional constraints on impairment of contracts. *Valencia*, supra  
 8 at 649.

#### 9 **4. No Jurisdiction for Declaratory Relief.**

10 The County of Monterey is not entitled to seek modification, revision or corrections to said  
 11 contract by means of a counterclaim for declaratory relief in the context of the Plaintiff's FLSA federal  
 12 collective action. There is no basis for federal jurisdiction. In addition, the County of Monterey has  
 13 a California law obligation to "meet and confer" in good faith regarding wages, hours, and other terms  
 14 and conditions of employment with the Deputy Sheriffs' Association of Monterey County, the  
 15 employee's union. Cal. Gov. Code § 3505. The County of Monterey has not alleged any exhaustion  
 16 of its administrative remedies to "meet and confer" over the terms of the MOU. As such, it has not  
 17 complied with California law and has no standing to bring or assert its contract modification  
 18 counterclaims in the context of this FLSA litigation collective action. *Jackson v. United States*, supra  
 19 1486; *Hart v. Department of Labor*, supra 1338.

20 In addition, there are no violations of the Labor Management Relations Action, § 301(a), 29  
 21 U.S.C. § 1985(a) that would confer any federal jurisdiction over this state law MOU contract dispute.  
 22 Cal. Government Code § 3500 seq. There is no basis for federal subject matter jurisdiction, either  
 23 facially or substantively. Thus, there is no standing on the part of the County of Monterey to assert any  
 24 basis for a declaratory relief action under, 28 U.S.C. § 1331, the Declaratory Judgment Act.

25 The operation of the Declaratory Judgment Act is procedural only. *Skelly Oil Company v.*  
 26 *Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). The Declaratory Judgment Act only operates to  
 27 expand remedies and not jurisdiction. *United Food & Commercial Workers*, supra at 1197. In  
 28 addition, the right to sue for injunctive relief under the FLSA rests exclusively with the federal

1 government. 29 U.S.C. § 217; *Powell v. Florida*, 132 F. 3<sup>rd</sup> 677, 678 (11<sup>th</sup> Cir., 1998); *United Food &*  
 2 *Commercial Workers*, supra at 1197-1198.

3 Further the union, the Deputy Sheriffs' Association of Monterey County, is not a proper party  
 4 to sue for relief under the FLSA, and 28 U.S.C. § 1331 cannot confer jurisdiction on the union, nor can  
 5 it provide the employer, the County of Monterey, with jurisdiction over the union for its counterclaims  
 6 under the theory that they arise under the FLSA. *United Food & Commercial Workers*, supra at 1201-  
 7 1202. Also, this is not a counterclaim for violations of some other federal law applicable to the MOU.  
 8 *United Food & Commercial Workers*, supra at 1202.

9 Likewise, the Declaratory Judgment Act cannot be used to create jurisdiction where none exists  
 10 under the FLSA. *Ibid*, at 1201-1202. This is also not a case of Article III standing. The union, the  
 11 Deputy Sheriffs' Association of Monterey County, might qualify as being subject to the jurisdiction  
 12 of the Court under the case or controversy general constitutional law standard; however, this  
 13 organizational standing is rendered irrelevant (moot) in light of the specific statutory bar on  
 14 representative actions under the FLSA. *United Food & Commercial Workers*, supra at 1201-1202.  
 15 There is a statutory ban on jurisdiction against the union in this action, even if some of its members  
 16 have filed consents to be included in the FLSA collective action against Monterey County. See:  
 17 *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167; *Lujan v. National*  
 18 *Wildlife Federation*, 497 U.S. 669.

### 19 III.

### 20 CONCLUSIONS

21 Based upon the foregoing, the County of Monterey's counterclaims fail to state a claim upon  
 22 which relief can be granted, and there is no federal jurisdiction over these claims.

24 Dated: June 6, 2008

**MASTAGNI, HOLSTEDT, AMICK,  
 MILLER, JOHNSEN & UHRHAMMER**

26 By: /s/ James B. Carr  
 27 JAMES B. CARR  
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 Counter-Defendants

IN THE UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA

DANIEL J. MITCHELL, acting for himself )  
 and others similarly situated, )  
 )  
 Plaintiffs, )  
 v. )  
 )  
 COUNTY OF MONTEREY, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

COUNTY OF MONTEREY, )  
 )  
 Counterclaimants, )  
 )  
 v. )

DEPUTY SHERIFFS' ASSOCIATION OF )  
 MONTEREY COUNTY, a labor )  
 organization and DAN MITCHELL, acting )  
 for himself and others similarly situated, )  
 DAVID A. ALLRED, JOHN C. BAIRD, )  
 JOSEPH ANTHONY CHAFFEE, JOHN )  
 DiCARLO, EDWARD DURHAM, DENNIS )  
 ENGLISH, NELSON GARCIA, RUBEN A. )  
 GARCIA, DUSTIN HEDBERG, ALFRED )  
 JIMENEZ, TIM KREBS, RICHARD D. )  
 MATTHEWS, BRUCE MAUK, WILLIAM )  
 D. NAPPER, SHAWN O'CONNOR, )  
 DAVID R. RATTON, KENNETH A. )  
 RESOR, ROBERT Q. RODRIGUEZ, (see )  
 next page) )

Case No.: C08-01166 JW

**[Proposed] ORDER GRANTING  
 MOTION TO DISMISS MONTEREY  
 COUNTY'S COUNTERCLAIMS**

[FRCP, Rule 12(b)(6) and Rule 12(b)(1);  
 Local Rule 7-2 (c)]

Date: September 22, 2008

Time: 9:00 a.m.

Dept.: 8

Judge: Hon. James Ware



1 MICHAEL R. SHAPIRO, and GARY )  
2 WHEELUS, and all other Plaintiffs who are )  
3 now or may hereafter be joined in this )  
4 proceeding, )

5 Counter-Defendants. )  
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Whereas Plaintiffs and Counter-Defendants' Motion to Dismiss the Monterey County Counterclaims contained in its Answer to the Complaint was heard before this Court on Monday, September 22, 2008 at 9:00 a.m., with James B. Carr appearing for Plaintiffs and Counter-Defendants and William K. Rentz appearing for Defendant and Counter-Claimant, and after consideration of the briefs and arguments of counsel, and all other matters presented to the Court:

**IT IS ORDERED** that Plaintiffs' Motion to Dismiss the County of Monterey's Counterclaims set forth in its Answer to the Complaint is hereby granted without leave to amend.

DATED: \_\_\_\_\_

\_\_\_\_\_  
Honorable James Ware  
United States District Judge